The Dutch Climate Case Judgment: Human Rights Potential and Constitutional Unease

Ingrid Leijten 2018-10-19T11:29:30

The Dutch climate case has reached a new high. The case, brought by Urgenda – a citizens' platform striving for a fast transition towards a sustainable society –, has received ample international attention especially after the verdict of the District Court of The Hague in 2015, which ordered the state to reduce greenhouse gas emissions by 25% by 2020. Last week, the Court of Appeal upheld this judgment. This time it did not rely on the doctrine of hazardous negligence. Instead, the Court of Appeal concludes that current actions to combat climate change are insufficient in the light of the state's human rights obligations. More precisely, its (lack of) action amounts to a violation of Articles 2 and 8 of the European Convention on Human Rights (ECHR), guaranteeing the right to life and to private and family life, respectively.

Watching the livestream of the judgment, I admittedly felt a sense of joy hearing the Court of Appeal conclude in favour of Urgenda. This revolutionary judgment confirmed the need for a more powerful agenda for saving our planet and achieving a sustainable future. The joyous feeling was however quickly replaced by some unease. How exactly did the Court interpret Articles 2 and 8 ECHR to conclude that the state must reduce its emissions by 25% by 2020? Was it really for the Court to determine what exact level of reduction must be achieved and by when? And if it gets away with this, what other sensitive, budgetary issues in principle reserved to the political realm can courts exert their influence on? Just like, I believe, all commentators who have made critical remarks, I think states must do absolutely everything within their powers to prevent (further) global warming. Still, there are various constitutional and human rights aspects to the judgment that raise some doubt and cannot go unnoticed. Besides, although an English transcript of the judgment was published online hours after it was rendered, the case simply is too interesting – for public law junkies – not to be analysed in some detail.

Human Rights as a Toolkit?

In 2015, the District Court did not rely on Articles 2 and 8 ECHR as it held that these provisions were not applicable to the case. The European Court of Human Rights (ECtHR) considers public interest actions non-admissible on the basis of Article 34 ECHR. The Court of Appeal, however, held that this did not mean that Urgenda could not rely on the ECHR before the Dutch courts and that according to Dutch law, Urgenda can rely on the ECHR. That it represents the interests of future generations is irrelevant as the current generation will also be confronted with the adverse effects of climate change. Moreover, in contrast to the District Court which relied on the

doctrine of hazardous negligence, the Court of Appeal bypasses this issue and focuses entirely on human rights.

In brief, its reasoning goes as follows: Articles 2 and 8 include protection in environment-related situations affecting or threatening to affect the right to life, as well as against adverse effects on the home and/or private life reaching a minimum level of severity. Both rights include the positive obligation to take concrete actions to prevent a future violation of these interests (a duty of care). In case of dangerous activities and when there is a known, real and imminent threat, the state must take precautionary measures to prevent infringements to the greatest extent possible. Assessing whether such a situation is present, the Court of Appeal list several facts and scientific evidence, to conclude that "it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generations of citizens will be confronted with loss of life and/or a disruption of family life" (par. 45). Therefore, the duty of care applies.

Next, the Court considers the international agreements and the actions of the Dutch government so far and concludes that a reduction obligation of at least 25% by end-2020 is in line with the state's duty of care under the ECHR. All counter-arguments put forward by the government in this regard fail. The government argued with "waterbed effects", carbon leakage, adaption measures taken, the lack of a causal link and the fact that the Dutch state cannot alone be held responsible for reducing greenhouse gas emissions. With regard to the uncertainties related to climate change, the Court holds, on the contrary, that this is reason to require more action. In this regard, it points out that the precautionary principle has been recognized by the ECtHR, notably in the 2009 case of *Tâtar v. Romania*.

Is the Court's reasoning that there has been a violation of Articles 2 and 8 ECHR convincing? I don't think so. First, the Court fails to distinguish between both Articles, even though a violation of the right to life is quite different from a violation of the right to private life, or family life, or the home. In fact, the Court remains vague as to which aspect of Article 8 is at stake and why. Article 2, in turn, applies primarily in cases in which death has occurred or, alternatively, where there is an imminent, concrete threat that this will happen. In light of the indeterminacy of the more general threats present here (who will die, when, and of what?), the applicability of the right to life would have hence required more detailed reasoning as well. It is one thing to claim that a state has not taken the necessary precautionary measures and in this way violated the right to life, once a serious environmental disaster leading to the loss of lives occurs. To hold that a state acts in violation of the right to life by committing itself to less ambitious environmental measures than arguably necessary, is quite another.

Both the right to life and the right to respect for private life (or family life, or the home) involve positive obligations. But they also leave a margin of appreciation. The issue of whether the Court with this judgment orders (particular) legislation to be adopted, is especially relevant in the Dutch context. Courts are not allowed to order the adoption of Acts of Parliament, and the Court of Appeal therefore underlines that the state remains completely free on how to comply with the order. At first sight, this seems to be in line with the Strasbourg doctrine of positive obligations:

what to achieve is clear, *how* it is done, is left to the government. The question, however, is whether the obligation established here (25% reduction by 2020) indeed can be inferred from Article 2 or at least from Article 8. This can only be the case if international (political) agreements and other norms can be said to determine the precise positive obligations the state has under the ECHR (cf. here). Rather than this very specific obligation, it seems more fitting – and in line with the ECtHR's case law – for the Court to require more generally that sufficient measures must be taken (the *what*), and to leave it to the state, and to politics, to determine the *how*, being the exact targets (percentages) aimed at for achieving this goal.

A Constitutional Matter

The separation of powers issue here is obvious. The Court of Appeal interferes with political decision-making by tackling a polycentric issue that however is not identified as such. Costs associated with the required reduction may come at the expense of housing programs, elderly care, or education. The ruling thereby significantly limits political deliberation and decision-making, today and in the future. In addition, judgments like these could lead states to think twice before reaching international agreements. Asking whether the Court went too far brings us right back to the question of whether there is indeed a legal obligation the judiciary simply requires the government to comply with. Besides from the viewpoint of human rights (see above), this issue can also be viewed from a constitutional angle.

The Dutch constitutional order is well-known for its openness to international law, and to the ECHR in particular. Lacking a constitutional court and having a constitutionally entrenched prohibition of constitutional review of Acts of Parliament (Article 120 of the Dutch Constitution), it is the ECHR that brings our fundamental rights to life. And it does so with success. Dutch judges in general are very dedicated to addressing claims on the basis of the Convention and are well-informed about the ECtHR's case law. However, Articles 93 and 94 of the Dutch Constitution, that arrange for the ECHR's direct effect, do not provide courts with a blank cheque to interpret the Convention rights in a way they see fit. Pursuant to Article 93 of the Constitution, provisions of treaties and resolutions by international institutions can be directly relied on before the national courts, given that they are "binding on all persons". This is the case for the rights listed in the ECHR. Article 94 then goes on to prescribe that statutory acts conflicting with these norms will not be applicable. However, referring to the same Article 94, the Dutch Supreme Court has held that it may not interpret the rights of the ECHR in a more generous way than does the ECtHR. In other words, international norms may have direct effect, yet this effect is limited to the way these norms are interpreted by the bodies tasked to do so.

This understanding entails that Dutch courts lack "ownership" of fundamental rights. This may be questionable, not least because the margin of appreciation granted in Strasbourg explicitly gives national courts a measure of discretion in judging on human rights issues. In the Urgenda case, however, this means first and foremost that in case of cassation, the Supreme Court need not be very creative to overturn the Court of Appeal's ruling and might argue that its interpretation of the ECHR went too far. This may be an "inconvenient truth" and I think there is indeed a case to

make for a more emancipated interpretation of fundamental rights at the national level, whether these are written in the Constitution or not. However, by 2020 these issues are unlikely to be resolved, meaning that, in any case, the government will be required to comply with the Court of Appeal's order.
